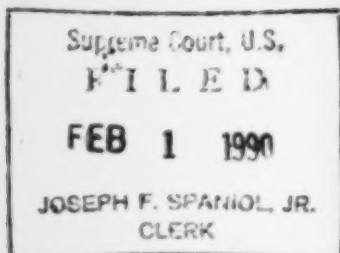


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No. 89-1109



In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PATRICIA MASON, *Petitioner*,

v.

CITY OF GASTONIA, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	13
I. The Court Below Properly and Cor- rectly Decided the Constitutional Issues Involved.....	13
II. Federal Court Review of Peti- tioner's Discharge Is Not Appro- priate.....	29
CONCLUSION.....	35

TABLE OF AUTHORITIES

CASES

<u>Bishop v. Wood</u> , 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).....	18,30,31,34,35
<u>City of Houston v. Hill</u> , 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).....	16
<u>Cleveland Board of Education v. Loudermill</u> , 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).....	18
<u>Dalton v. Mercer County Board of Education</u> , 887 F.2d 490 (4th Cir. 1989).....	24
<u>Doran v. Houle</u> , 721 F.2d 1182 (9th Cir. 1983), cert. denied, 466 U.S. 950, 104 S. Ct. 2152, 80 L. Ed. 2d 538 (1984),.....	16
<u>Ford Motor Company v. Equal Employment Opportunity Commission</u> , 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982).....	34
<u>Hatton v. Wicks</u> , 744 F.2d 501 (5th Cir. 1984).....	17
<u>Kline v. Lorrillard, Inc.</u> , 878 F.2d 791 (4th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3412 (U.S. December 13, 1989) (No. 89-943).....	23

<u>Lytle v. Household Manufacturing, Inc., No. 88-334.....</u>	26
<u>McConnel v. Anderson, 451 F.2d 193</u> (8th Cir. 1971), <u>cert. denied</u> , 405 U.S. 1046, 92 S. Ct. 1312, 31 L. Ed. 2d 588 (1972).....	17
<u>Memphis Light Gas & Water Division v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).....</u>	15
<u>Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, (1973).....</u>	15
<u>Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).....</u>	28
<u>Straitwell v. National Steel Corporation, 869 F.2d 248 (4th Cir. 1989).....</u>	25
<u>Thornton v. Bean Contracting Co., Inc., 592 F.2d 1287 (5th Cir. 1979).....</u>	24
<u>Town of Newton v. Rumery, 480 U.S. 386, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987).....</u>	34
<u>U.S. v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966).....</u>	24
<u>Williams v. Cerberonics, Inc., 871 F.2d 452 (4th Cir. 1989)....</u>	22,23

AMENDMENTS

Seventh Amendment..... 13

RULES

Rule 52, Federal Rules of Civil
Procedure..... 13

PUBLICATIONS

Schnapper, Judges Against Juries,
1989 Wis. L. Rev. 237, (1989).. 21

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The respondents respectfully
request that this Court deny the peti-
tion for a writ of certiorari seeking
review of the Fourth Circuit opinion in
this case.

STATEMENT OF THE CASE

Patricia Mason worked for the City of Gastonia in a clerical capacity for approximately eight years prior to her termination. She was promoted to a Clerk III, further promoted to Clerical Supervisor and subsequently transferred into the Collections Division as a Clerical Supervisor in April of 1983. (J.A. 135-136).^{1/} Her immediate supervisor was Blair Wilson, who in turn reported to James Philyaw, the City's Finance Director. In her position in the Collections Division, Mason was responsible for the security of the collections received by the tellers in the Collections Department. Mason's

1/ Reference to J.A. are to the Joint Appendix to the Court of Appeals. References to Pet. are to Mason's petition.

duties included responsibility for the safe provided by the City for the deposit of all cash collections at the close of the business day and she "was obligated to keep up with the combination of it, change [the combination of the safe] periodically and close it at the end of each day and make sure it was locked." (J.A. 137).

Historically, Gastonia had problems with security of its safe. Prior to 1983, a safe was left open and money was missing. (J.A. 307). On a second occasion in April 1983, a safe in the Tax Office was left open. (J.A. 307). The supervisor who was responsible for closing and opening the safe at that time was suspended for five days without pay, put on probation for six months and ultimately was transferred

out of the Collections Division.

(J.A. 308-309). As a result of those security problems, all the supervisors in the Billings, Collections and Tax Offices, including Mason, met in May 1983 with the City's accountants to formalize procedures for ensuring that the City's money was properly safeguarded. At that time, all the supervisors were told that open safes would no longer be tolerated.

(J.A. 309-310). Specifically, all the supervisors were told "if there was any more incidents of open safes that the person responsible for overseeing this safe was closed and locked would be terminated." (J.A. 310).

On September 14, 1983, fifteen minutes after the close of business, Jim Philyaw checked the safe in the Tax

Office to see that it was locked.

(J.A. 312). When Philyaw entered the office, he looked over the tellers' station and discovered that the door to the safe was open. (J.A. 312).

Philyaw called the police; the City Manager, Gary Hicks; and Blair Wilson, to come to City Hall. Philyaw asked Blair Wilson to contact Mason.

(J.A. 313). When Mason came to City Hall, Philyaw asked her if she closed the safe "and she said she could not remember if she closed it or not."

(J.A. 314). In addition, Philyaw "asked her if she would be willing to take a polygraph to clear up any questions that might have arisen. She said she would not submit to a polygraph test. She felt like it would perjure herself." (J.A. 314-315). Philyaw

checked the contents of the safe and discovered that no money was missing. (J.A. 315). However, there was \$30,000 in the safe, well over the approximately \$2,350 that was the limit for remaining in the safe at night.

(J.A. 316). The police investigator examined the safe and its lock for fingerprints and did not find any. The office where the safe was located was examined and there was no sign of forced entry. The envelopes containing the combination for the safe were unopened. On September 16, 1983, Philyaw made a report of the incident to the Mayor, Councilmen and City Manager. He reviewed the investigation that had taken place and the consultations he had with the City's auditor and with the City Attorney, who had

both concluded that the employees involved should be terminated. Philyaw further reported that he called Mason into his office to discuss the incident and gave Mason the opportunity to resign, which she did not do. Mason was dismissed by Philyaw effective September 19, 1983. (J.A. 318-319). Philyaw gave her a written "Notice of Disciplinary Action" which included notice of her right to appeal.^{2/} (J.A. 154, 155 663). Philyaw also terminated the employment of Blair Wilson, Mason's supervisor. (J.A. 317).

2/ The Personnel Ordinance effective January 1, 1983, and in effect at the time of plaintiff's dismissal, specifically provided that "Disciplinary action may be taken against an employee for any reason deemed sufficient by the employer." (J.A. 320, 736).

Mason thereafter appealed her dismissal. A hearing was held before City Manager Hicks. Blair Wilson and his attorney, Mason and her attorney, and three other witnesses attended the hearing. (J.A. 322-323). Evidence was presented at the hearing, including a police officer's report, and Mason's attorney was allowed to argue to the City Manager. (J.A. 202-203). Hicks also considered the evidence that the combination to the safe could be read through the envelopes when held up to the light. Hicks took Mason's case under advisement and subsequently upheld her dismissal, finding that it was the duty of Mason to see to the "security of the safe" and that, "by virtue of her position, [she was] accountable for incidents within [her] purview." (J.A. 168, 323, 757).

Thereafter, Mason appealed to the City Council, which granted her a hearing at which she was represented by her attorney. (J.A. 324). At this hearing, all the evidence that was presented to the City Manager was presented to the City Council. After the hearing, the Council agreed with the decision of the City Manager, but as a means of settling the dispute, offered to reinstate Mason without back pay for the time she was out of work during the investigation of the open safe incident. The offer of reinstatement also included a release of liability by Mason. (J.A. 170). Wilson returned to work under this arrangement and was employed by the City at the time of trial. (J.A. 224, 233). However, Mason refused the offer and was terminated from employment.

Almost two years later, on August 2, 1985, Mason filed this action claiming constitutional violations in that she had not been granted her procedural due process rights and that she had been denied substantive due process rights by her arbitrary and capricious discharge. At trial, the City's motion for a directed verdict was denied. The cause was submitted to the jury, which found in favor of Mason. Specifically, the jury found that Mason's due process rights had been violated and that her substantive due process rights were violated because her discharge was arbitrary and capricious. (Pet. 1a-16a). The defendants appealed that decision.

On appeal, the Fourth Circuit remanded the cause to district court to determine which of two personnel ordinances was applicable to Mason and whether those ordinances created a property interest in continued unemployment so that Mason had procedural due process rights. (Pet. 17a-25a). On remand, the district court interpreted the ordinances and found that they did create due process rights in Mason and affirmed the earlier judgment. (Pet. 26a-35a). In reinstating the jury verdict, the district court did not consider the question of whether Mason had been afforded her due process rights in the proceedings which resulted in a decision of termination. Defendants appealed the final judgment on the basis that, as a matter of law,

Mason had no due process rights since she did not have a property interest in continued employment and that, even if she had due process rights, those rights were satisfied by the hearings provided to Mason.

The Fourth Circuit reversed the verdict, holding that Mason had received all the due process to which she was constitutionally entitled. The Fourth Circuit did not reach the question of whether Mason had a property interest in continued employment. (Pet. 36a-68a). The Fourth Circuit also found that Mason had no claim on her substantive due process rights.

REASONS FOR DENYING THE WRIT

I. The Court Below Property and Correctly Decided the Constitutional Issues Involved.

Petitioner argues that the Fourth Circuit has made a *de novo* finding of fact on appeal which violates Rule 52, Federal Rules of Civil Procedure and the Seventh Amendment. Petitioner further argues that this is part of a practice by the Fourth Circuit of ignoring jury factual findings and that this practice conflicts with the practices of other circuits. As is made clear below, petitioner's arguments are without merit and are not a reason for this Court to grant petitioner's writ.

Petitioner alleged in her complaint that she had a property interest in continued employment with the City

of Gastonia, which gave her procedural due process rights under the United States Constitution. She also alleged that her substantive due process rights under the Constitution were violated. After trial on these claims, a "finding of fact" was made that (1) "the defendants violated plaintiff's right to procedural due process in that the defendants failed to provide plaintiff a hearing before a neutral and unbiased fact finder" and (2) "the defendant violated plaintiff's right to substantive due process by arbitrarily and capriciously discharging plaintiff from her job." (Pet. 3a, 10a). On appeal, the Fourth Circuit correctly ruled that, even if petitioner had a property interest in continued employment, she had received her constitutionally

required procedural due process rights and thus had no procedural due process claim. The court also correctly found that she had not been denied her substantive due process rights. (Pet. 36a-68a).

Petitioner contends that the holding by the Fourth Circuit ignores the findings of fact by the trial court and amounts to a *de novo* review of the case. What petitioner fails to recognize is that this Court has always held *de novo* appellate review is proper when a constitutional deprivation is at issue. See Miller v. California, 413 U.S. 15, 25, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419, 431 (1973) (appellate courts have "the ultimate power to conduct an independent review of constitutional claims when necessary"); Memphis

Light Gas & Water Division v. Craft,
436 U.S. 1, 98 S. Ct. 1554, 56
L. Ed. 2d 30 (1978) (whether a property
interest exists remains a legal issue
requiring an interpretation of the Fed-
eral Constitution); City of Houston v.
Hill, 482 U.S. 451, 107 S. Ct. 2502,
2507 n. 6, 96 L. Ed. 2d 398 (1987) ("An
independent review of the record is
appropriate where the activity in ques-
tion is arguably protected by the Con-
stitution"). This line of cases has
been followed by the circuit courts in
cases similar to the one at bar. For
example, in Doran v. Houle, 721 F.2d
1182 (9th Cir. 1983), cert. denied, 466
U.S. 950, 104 S. Ct. 2152, 80 L. Ed. 2d
538 (1984), the court reversed a jury
verdict in favor of plaintiff when the
court found that, as a matter of law,

plaintiff had no property interest in the continued receipt of government benefits. Likewise, in Hatton v. Wicks, 744 F.2d 501 (5th Cir. 1984), the court found that, as a matter of constitutional law, plaintiff's discharge did not violate her substantive due process rights. Finally, In McConnel v. Anderson, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046, 92 S. Ct. 1312, 31 L. Ed. 2d 588 (1972), the court reversed an injunction issued by the trial court in a § 1983 action when it found that the state action in question was not arbitrary and capricious.

In the instant matter, the Fourth Circuit reviewed whether petitioner's constitutional due process rights had been violated. The only findings of

fact made in the trial court were actually questions of law on the ultimate issue of whether there was a constitutional deprivation. It is necessarily a question of law for the court to decide if the plaintiff is invested with a property right and, if so, whether her due process rights as afforded by the Constitution were satisfied. Likewise, the question of whether Mason's right to substantive due process was violated is also a question of law for the court and the Court is not bound by a clearly erroneous standard. In deciding these questions, the Fourth Circuit correctly applied this Court's ruling in Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976), and Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

As the court below properly analyzed and decided the constitutional issues involved, this Court should deny the petitioner's writ.

In her writ, petitioner creates the impression of a conflict between the courts of appeal as to the standard applied in reviewing lower court decisions. However, there is no conflict between the circuits as to how courts should review issues involving the ultimate question of the interpretation of constitutional rights. Even assuming that the courts are reversing findings of facts, the statistics and cases relied upon by petitioner do not demonstrate a conflict between the circuits and are not a reason for the Court to grant petitioner's writ.

First, petitioner cites statistics derived from a law review article which tend to show that there is a wide disparity between the circuits in the percentage of district court decisions that are reversed. In Mason's petition, a table of statistics is set forth in the following form:

<u>Circuit</u>	<u>Reversal-Reduction Rate</u>
Ninth	11.1%
First	22.2%
Sixth	26.3%
Eleventh	37.5%
Tenth	45.5%
Fifth	45.5%
Third	50.0%
Eight	53.1%
Seventh	56.7%
Fourth	63.6%
District of Columbia	66.7%
Second	70.0%

(Pet. 39). However, the table actually appearing in the article is as follows:

<u>Circuit</u>	<u>Reversal-Reduction Rate</u>
Ninth	11.1% (1 of 9)
First	22.2% (2 of 9)
Sixth	26.3% (5 of 19)
Eleventh	37.5% (6 of 16)

Tenth	45.5% (5 of 11)
Fifth	45.5% (17 of 37)
Third	50.0% (6 of 12)
Eighth	53.1% (17 of 32)
Seventh	56.7% (17 of 30)
Fourth	63.6% (7 of 11)
District of Columbia	66.7% (4 of 6)
Second	70.0% (7 of 10)
Federal	100% (4 of 4)

Schnapper, Judges Against Juries, 1989

Wis. L. Rev. 237, 251 (1989). The actual table shows that the percentages on which petitioner relies to show a conflict between the circuits are based on a wholly inadequate number of cases to be able to draw any valid conclusions regarding reversal rates. A further review of the law review article from which petitioner derives her statistics shows that the percentages are based only on published federal appellate decisions for a one-year period. Id. at 246. The statistical sample does not include the numerous cases

which were ruled on and simply not published in the case reporter, nor does the sample include cases that were ruled on without even a written opinion. Respondents submit that these seriously flawed statistics are not a sufficient reason for this Court to grant petitioner's writ.

Likewise, the anecdotal cases on which petitioner relies to try to show that the Fourth Circuit is out of step with other circuits do not withstand close scrutiny. Petitioner cites Williams v. Cerberonics, Inc., 871 F.2d 452 (4th Cir. 1989), as a case in which the Court rejected a jury verdict of racial discrimination. (Pet. 33). Actually, the Fourth Circuit affirmed a judgment for the defendant by the trial judge on plaintiff's Title VII claim

and also affirmed the trial judge's granting of a j.n.o.v. as to plaintiff's \$ 1981 claim. Williams, 871 F.2d at 455.

Petitioner cites Kline v. Lorrillard, Inc., 878 F.2d 791 (4th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3412 (U.S. December 13, 1989) (No. 89-943), as a case in which the court rejected the jury's interpretation of a written agreement. (Pet. 33). A closer reading of the case shows that the court ruled that plaintiff's breach of contract claim was barred by the Maryland Statute of Frauds and plaintiff's Robinson-Patman claim failed as a matter of law. Kline, 878 F.2d at 800. Thus, the issues which the court decided the case on are issues which are questions of

law which the Court may decide *de novo*.
See U.S. v. General Motors Corp., 384
U.S. 127, 141 n. 16, 86 S. Ct. 1321,
1328 n. 16, 16 L. Ed. 2d 415 (1966);
Thornton v. Bean Contracting Co., Inc.,
592 F.2d 1287 (5th Cir. 1979).

Petitioner cites Dalton v. Mercer
County Board of Education, 887 F.2d 490
(4th Cir. 1989), as a case in which the
Court overturned a jury's finding.
(Pet. 34). In fact, the Fourth Circuit
found for defendants in the case based
on its interpretation of a West Vir-
ginia law that required the hiring of
an individual other than plaintiff.
This hiring constituted the observance
of a *bona fide* seniority system and
thus, as a matter of law, was not a
violation of the Age Discrimination in
Employment Act, 29 U.S.C. § 621, et
seq. Dalton, 887 F.2d at 492.

Finally, petitioner cites Straitwell v. National Steel Corporation, 869 F.2d 248 (4th Cir. 1989), in support of her contention that the Fourth Circuit regularly ignores jury findings. However, this reliance is misplaced, as Straitwell was decided by the court on the question of whether a qualified privilege existed in defense of a libel claim, which is clearly a question of law for the Court. Straitwell, 869 F.2d at 251. Thus, petitioner's writ fails to demonstrate, either through the flawed statistical data she presents or isolated cases, that the Fourth Circuit is out of step or in conflict with other circuits on this count. Her argument is without merit and the Court should deny petitioner's writ.

Perhaps in further recognition of the weakness of the merits of her writ, Petitioner has suggested that a decision on her petition should be deferred until this Court decides the case of Lytle v. Household Manufacturing, Inc., No. 88-334. Such a deferral is clearly not necessary as the decision by this Court in Lytle will not affect the correctness or reviewability of the decision below. The issue in Lytle is whether a district court's finding in a Title VII trial collaterally estops the plaintiff from relitigating the finding before a jury under a different legal theory arising out of the same facts. As made clear above, the Fourth Circuit's decision in the instant case involved issues of constitutional deprivation which are questions of law

and does not remotely require a decision on the issue of whether or not a judge's findings of fact collaterally estop a jury from deciding the same facts on another related legal issue.

Another reason for denying petitioner's writ is, in addition to the Fourth Circuit's reasoning in this case, there are other meritorious arguments that show that the outcome below is correct.

First, the Fourth Circuit never reached the issue of whether Mason actually had a property interest in continued employment so as to grant her procedural due process rights. Had the Fourth Circuit reached this issue, it would have ruled that petitioner had no property interest and thus had no due process rights in continued employment.

The record below indicates that under North Carolina law, petitioner had not been granted, by statute or contract, any form of guarantee necessary to create a property interest.

Second, even if Mason had a property interest in continued employment, her § 1983 claim did not state a cause of action since she had available adequate state law remedies which she could have pursued in state court. This Court has held in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), that when the state deprives an individual of a property interest as the result of the unauthorized failure of its agents to follow state procedure, due process is satisfied by the availability of meaningful post-deprivation process. In

the instant case, petitioner merely complained that the defendants failed to follow proper procedure. She did not allege that the proper procedures were unconstitutional or that the state implicitly authorized deviations from them.

Thus, since there are other meritorious grounds for the decision below, the petitioner's writ should be denied.

II. Federal Court Review of
Petitioner's Discharge Is Not
Appropriate.

Petitioner alleged in her complaint and argues in her writ that the City's decision to discharge her was arbitrary and capricious and thus a violation of her substantive due process rights. However, the decisions of this Court make plain that petitioner's argument is without merit and her writ should be denied.

This Court has made clear that federal courts are not the appropriate forum for a review of City personnel decisions:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 349-50,

96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684, 693 (1976).

Petitioner has never made any claim that the decision to discharge her was motivated by racial or sexual consideration, by a First Amendment violation or by any other exercise of constitutionally protected rights. Rather, petitioner has alleged that there was no rational basis for the decision to discharge her and that the decision was erroneous. In invoking the concept of substantive due process, petitioner is merely trying to gain federal court review of a decision by the City of Gastonia with which she disagrees. In its decision, the Fourth Circuit properly recognized that Bishop makes clear such a review is not available to petitioner.

In attempting to instill new life into her substantive due process argument, petitioner argues that her substantive due process rights were violated when the City discharged her after she refused to accept reinstatement conditioned on a release of claims.

This argument is still not a reason for granting petitioner's writ. First, petitioner characterizes the offer of reinstatement by the City Council to Mason as a situation in which Mason would be discharged if she did not release any claims she might have against the City. A closer analysis of the record shows that the decision to discharge Mason had already been made at two lower levels and the City Council agreed with that decision.

However, as a means of settling the situation, the City Council offered Mason reinstatement in exchange for a release of any claims. Petitioner's present argument that such settlement offers are not proper would lead to a conclusion that a municipality should always proceed with an unconditional discharge without any attempt to fashion a reasonable resolution between the parties. It is difficult to see how such a state of affairs would serve the interests of either the public employee or the public employer.

Second, Petitioner's new argument simply does not implicate the concept of substantive due process since she still has not shown that her discharge was based on the desire to curtail or penalize the exercise of her

constitutionally protected rights. The decisions in Town of Newton v. Rumery, 480 U.S. 386, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987), and Ford Motor Company v. Equal Employment Opportunity Commission, 458 U.S. 219, 102 S. Ct. 2057, 73 L. Ed. 2d 721 (1982), which are cited by petitioner in her writ do not stand for the proposition that basing an offer of reinstatement on the execution release violates an individual's substantive due process rights. These cases are clearly distinguishable from the instant matter on their facts and the propositions of law for which they stand.

In sum, petitioner is dissatisfied with the decision to terminate her and is asking the Court to open the door that it closed in Bishop and allow

discharged public employees to obtain judicial review of the merits of the decision to discharge them. Respondents submit that the rationale of Bishop is still compelling and petitioner has not presented the Court a reason to grant her writ.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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